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Author(s): Ronald M. Dworkin
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IS WEALTH A VALUE?

*RONALD M. DWORKIN**

I

In this essay I consider and reject a political theory about law often called the economic analysis of law. (That name is the title of an extended book by Professor Richard Posner,[1] and I shall be concerned largely, though not entirely, with arguments that Posner has himself presented.) The economic analysis of law has a descriptive and a normative limb. It argues that common law judges, at least, have on the whole decided hard cases to maximize social wealth, and that they ought to decide such cases in that way. I shall discuss the normative limb of the theory mainly, although at the end of the essay I shall argue that the normative failures of the theory are so great that they cast doubt on its descriptive claims, unless these descriptive claims can be embedded within a very different normative theory.

The concept of wealth maximization is at the center of both the descriptive and normative aspects of the theory. But it is a concept that is easily misunderstood, and it has been misunderstood, in a certain way, by its critics. "Wealth maximization" is a term of art within the theory, and is not intended to describe the same thing as "Pareto efficiency." In this introductory section, I shall try to explain each of these terms, to show why it misunderstands the economic analysis of law to suppose, as critics have, that the lawyer's definition of the former is a botched attempt to capture the meaning of the latter.

Wealth maximization, as defined, is achieved when goods and other resources are in the hands of those who value them most, and someone values a good more only if he is both willing and able to pay more in money (or in the equivalent of money) to have it. An individual maximizes his own wealth when he increases the value of the resources he owns; whenever he is able, for example, to purchase something he values for any sum less than the most he would be willing to pay for it. Its value to him is measured by the money he would pay if necessary; if he is able to pay, say $4, for what he would pay

* Professor of Jurisprudence, Oxford University.

[1] Economic Analysis of Law (2nd ed. 1977).

$5 to have if necessary, his wealth has been increased by $1. Society maximizes its wealth when all the resources of that society are so distributed that the sum of all such individual valuations is as high as possible.

There are many conceptual difficulties in this idea of individual and social wealth maximization. Some of these will emerge in the course of our discussion, but one is sufficiently isolable that it can be disposed of now For most people there is a difference between the sum they would be willing to pay for something that they do not have and the sum they would take in exchange for it if they already had it. Sometimes the former sum is greater—the familiar "grass is greener" phenomenon that leads someone to covet his neighbor's property more than if it were his own. If many people were often in that position, then social wealth maximization would be inherently unstable. Social wealth would be improved by a transfer of some property from A to B, but then improved by a retransfer from B to A, and so on. In these circumstances, that is, wealth maximization would be a cyclic standard—a very disagreeable property in a standard of social improvement. The second case is perhaps more common (although not either more or less rational); someone will ask more for something he owns than he would pay to acquire it. When I am lucky enough to be able to buy Wimbledon tickets in the annual lottery for £5, I will not sell them for, say, £50, although I will certainly not pay £20 to buy them when I lose in the lottery. If many people are in that position with respect to many goods, then wealth maximization will not be path-independent; the final distribution that achieves a wealth maximization will be different, even given the same initial distribution, depending upon the order in which intermediate transfers are made. Path-dependency is not so serious a flaw as cyclicity, but does nevertheless introduce an element of arbitrariness into any scheme of transfers designed to promote social wealth maximization.

Neither Posner nor other proponents of economic analysis of law seem much bothered by either possibility. They assume, perhaps, stipulations of rationality that preclude differences in pay-or-take value of this sort. Or, perhaps, they are concerned principally with the behavior of commercial firms where such stipulations would not seem so arbitrary. It will do no harm, however, to tighten their definitions. We may say that the goal of wealth maximization is served by a particular transfer or distribution only when that transfer would increase social wealth measured by what the person into whose hands the good falls would pay if necessary to acquire it, and *also* by what he would take to part with it. In cases where the two tests disagree, the standard of social wealth maximization is indeterminate. Indeterminacy in some cases is no great objection to any standard for social improvement, provided, of course, that such cases are not disagreeably numerous.

The familiar economist's concept of Pareto efficiency (or Pareto optimality) is a very different matter. A distribution of resources is Pareto efficient if no change in that distribution can be made that leaves no one worse off and at least one person better off. It has often been pointed out that almost any widespread distribution of resources meets that test. Even willing trades that improve the position of both parties may adversely affect some third party by, for example, changing prices. It would be absurd to say that judges should make no decision save those that move society from a Pareto-inefficient to a Pareto-efficient state. That constraint is too strong, because there are few Pareto-inefficient states; but it is also too weak because, if a Pareto-inefficient situation does exist, any number of different changes would reach a Pareto-efficient situation and the constraint would not choose among these.

Suppose no court has decided, for example, whether a candy manufacturer is liable to a doctor if the manufacturer's machine makes it more difficult to practice medicine in an adjacent building.[2] The doctor does not have a recognized legal right to damages or an injunction, but neither does the manufacturer have a recognized right to run his machine without paying such damages. The doctor sues the candymaker, and the court must decide which of these two rights to recognize. Neither decision will be Pareto-superior to the situation before the decision, for either decision will improve the position of one party at the expense of the other. Both decisions will reach a Pareto-efficient result, for no further change in the legal position would benefit one without hurting the other. So the requirement, that the court should decide in favor of a Pareto-superior rule, if one is available, would be useless in such a case.

But the different advice, that the court should choose the rule that maximizes social wealth, is far from useless. Professor Coase argued that, if transaction costs were zero, it would make no difference to that goal which of the two decisions the court made.[3] If the decision did not in itself maximize wealth, then the parties would negotiate a solution that did. But since transaction costs are always positive, it will in practice make a difference. If the candymaker would lose $10 by not running his machine, and the doctor would lose only $9 if the machine were run, then social wealth would not be maximized by a rule giving the doctor a right to prevent the running of the machine, if transaction costs would exceed $1. The judge should, therefore, choose so that goods (in this case the right to practice medicine free from noise or the right to make candy free from injunction) are given di-

[2] Compare Sturges v. Bridgman, 11 Ch. D. 852 (1879), and discussion of that case in R. H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960).

[3] Coase, *supra* note 2.

rectly, by his decision, to that party who would purchase the right if not assigned it, and would not sell it if assigned it, in both cases assuming that transaction costs were zero. In many cases this requirement, unlike the requirement of Pareto superiority, would dictate a unique solution. If the candy manufacturer makes enough through his noisy machine to compensate fully the doctor for his lost practice and still have profit left over, as he does on the figures just assumed, then the right to make the noise without compensation should be assigned to the candymaker. Of course, that will not produce the *distribution* that would have been achieved if the right had been assigned to the doctor and there were no transaction costs. In that case the doctor would have had something over $9 and the candymaker something less than $1. Now the candymaker will have $10 and the doctor nothing. But that produces more total *social* wealth than the only actual alternative, given the transaction cost, which is that the candymaker have nothing and the doctor $9.

So the theory of wealth maximization is both different from the theory of Pareto efficiency and more practical. The economic analysis of law, which makes the concept of wealth maximization central, must therefore be distinguished from the economists' analysis of law, that is, from the application to legal contexts of the economists' notion of efficiency, which is Pareto efficiency. When an economist asks whether a rule of law is efficient, he usually means to ask whether the situation produced by the rule is Pareto-efficient, not whether it is wealth maximizing. Much confusion could have been avoided if Posner and others had not used the words "economic" or "efficient" in their description of their own work. Economists would not have been so concerned to point out that these words are obviously not used in their normal professional sense. They would not then have supposed that Posner and his colleagues had made some simple conceptual mistakes.

II

But now comes the nerve of the problem. Economic analysis holds, on its normative side, that social wealth maximization is a worthy goal so that judicial decisions should try to maximize social wealth, for example, by assigning rights to those who would purchase them but for transaction costs. But it is unclear *why* social wealth is a worthy goal. Who would think that a society that has more wealth, as defined, is either better or better off than a society that has less, except someone who made the mistake of personifying society, and therefore thought that a society is better off with more wealth in just the way any individual is? Why should anyone who has not made this mistake think social wealth maximization a worthy goal?

There are several possible answers to this question, and I shall start by

deploying a number of distinctions among them. (I) Social wealth may be thought to be itself a component of social value—that is, something worth having for its own sake. There are two versions of this claim. (*a*) The immodest version holds that social wealth is the *only* component of social value. It argues that the only respect in which one society may be better or better off than another is that it may have more social wealth. (*b*) The modest version argues that social wealth is one component of social value among others. One society is *pro tanto* better than another if it has more wealth, but it might be worse overall when other components of value, including distributional components, are taken into account.

(II) Social wealth may be thought to be, not a component, but an instrument of value. Improvements in social wealth are not valuable in themselves, but valuable because they may or will produce other improvements that are valuable in themselves. Once again, we may distinguish different versions of the instrumental claim. (*a*) The causal claim argues that improvements in social wealth themselves cause other improvements: improvements in wealth, for example, improve the position of the worst-off group in society by alleviating poverty through some invisible hand process. (*b*) A second claim argues that improvements in social wealth are ingredients of social value, because although they do not work automatically to cause other improvements, they provide the material for such improvements. If a society has more wealth, it is better off because it is in a position to use that increased wealth to reduce poverty. (*c*) A third claim holds that social wealth is neither a cause nor an ingredient of social value, but a surrogate for it. If society aims directly at some improvement in value, such as trying to increase overall happiness among its members, it will fail to produce as much of that goal than if it instead aimed at improving social wealth. Social wealth is, on this "false-target" account, a second-best goal, valued not for its own sake, nor because it will cause or can be used to bring about other improvements, but because there is a sufficiently high correlation between improvements in social wealth and such other improvements to make the false target a good target.

Another distinction cuts across these. Each of these modes of social wealth claims, except the immodest version of the component-of-value claim, may be combined with some functional claim of institutional responsibility which argues that it is the special function of courts to pursue social wealth single-mindedly, although it is not necessarily the function of, for instance, legislatures to do so. It might be said, for example, that although wealth maximization is only one among several components of social value, it is nevertheless a component that courts should be asked single-mindedly to pursue, leaving other components to other institutions. Or that although social wealth is only an ingredient of social value it should be left to courts to

maximize that ingredient, on the understanding that the further use of the ingredient is the province of other institutions. Or that social wealth is a value surrogate for courts, because courts cannot for some reason pursue the true target directly, though other institutions can and therefore need no surrogate or perhaps need a different surrogate. I shall call a theory of this sort a strong institutional theory—"institutional" because it specifies reasons why one institution should pursue social wealth maximization, and "strong" because it requires that those institutions do so single-mindedly.

The normative claim of economic analysis, then, admits of many variations. Calabresi, Posner, and other advocates of that analysis have not been as clear as they might be about which variation they wish to promote, so any thorough discussion of their claims must consider different possibilities and paint on a reasonably wide canvas. I shall begin by considering whether the claim that social wealth is a component of value, in either the immodest or the modest versions of that claim, is a defensible idea.

III

I think it is plain it is not. Perhaps no one thinks it is, although there has been much careless rhetoric on this score.[4] Before I provide an illustration that seems to me decisive against the component-of-value theory, however, I shall try to clarify the point at issue. If economic analysis argues that law suits should be decided to increase social wealth, defined in the particular way described, then it must show why a society with more wealth is, for that reason alone, better or better off than a society with less. I have distinguished, and now propose to consider, one form of answer: social wealth is in itself a component of value. That answer states a theory of value. It holds that if society changes so that there is more wealth then that change is in itself, at least *pro tanto,* an improvement in value even if there is no other change that is also an improvement in value, and even if the change is in other ways a fall in value. The present question is not whether a society that follows the economic analysis of law will produce changes that are improvements in wealth with nothing else to recommend them. The question is whether such a change would be an improvement in value. That is a question of moral philosophy, in its broadest sense, not of how economic analysis works in practice. If the answer to my question is no—a bare improvement in social wealth is not an improvement in value—the claim that social wealth is a component of value fails, and the normative claim of economic analysis needs other support.

[4] See, e.g., Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8, J. Legal Stud. 103. The following passages from that essay (among others) illustrate the assumption that wealth maximization is a value in itself, so that the claims for wealth maximization are to be understood as claims of the same order as, and competing with, the claims of the utilitar-

Consider this hypothetical example. Derek has a book Amartya wants. Derek would sell the book to Amartya for $2 and Amartya would pay $3 for it. T (the tyrant in change) takes the book from Derek and gives it to Amartya with less waste in money or its equivalent than would be consumed in transaction costs if the two were to haggle over the distribution of the $1 surplus value. The forced transfer from Derek to Amartya produces a gain in social wealth even though Derek has lost something he values with no compensation. Let us call the situation before the forced transfer takes place "Society 1" and the situation after it takes place "Society 2." Is Society 2 *in any respect* superior to Society 1? I do not mean whether the gain in wealth is overridden by the cost in justice, or in equal treatment, or in anything else, but whether the gain in wealth is, considered in itself, any gain at all. I should say, and I think most people would agree, that Society 2 is not better in any respect.[5]

It may be objected that in practice social wealth would be maximized by rules of law that forbid theft and insist on a market exchange, when it is feasible, as it is in my imaginary case. It is true that Posner and others recommend market transactions except in cases in which the transaction costs (the costs of the parties identifying each other and concluding an agreement) are high. But it is crucial that they recommend market transactions for their *evidentiary* value. If two parties conclude a bargain at a certain price we can be sure that wealth has been increased (setting aside problems of externalities) because each has something he would rather have than what he gave up. If transaction costs are "high" or a transaction is, in

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ians that happiness is a value in itself: (*a*) ". . . the economist, when speaking normatively, tends to define the good, the right, or the just as the maximization of 'welfare' in a sense indistinguishable from the utilitarian's concept of utility or happiness. . . . But for my normative purposes I want to define the maximand more narrowly, as 'value' in the economic sense of the term or, more clearly I think, as 'wealth.' " *Id.* at 119. (*b*) "While nowadays relatively few of the people in our society who think about these things consider wealth maximization or some other version of efficiency the paramount social value, few judge it a trivial one. And, as mentioned, sometimes it is the only value at stake in a question . . . . But I am unwilling to let the matter rest there, for it seems to me that economic analysis has some claim to being regarded as a coherent and attractive *basis* for ethical judgments. I am less clear that utilitarianism has such a claim." *Id.* at 110. (Emphasis added.)

[5] Anyone who wishes a more familiar (though in certain irrelevant ways more complex) example may substitute this one. Suppose a public body needs a piece of land in private hands but the owner will not sell. In these circumstances a court might order a compulsory transfer at some price the public body is willing to pay and the seller would in fact accept if he believed it was the best he could get. If we assume that there is such a price, then (in our substitute case) the court compels transfer with no compensation whatsoever to the seller. The transaction costs of litigating to fix the precise compensation will be saved, and we assume that these are greater than any consequential costs. (See Posner, *supra* note 1, at 40-44.) Is the situation immediately after the forced and uncompensated transfer in any respect superior to the situation just before? (The warnings I give in the text against misunderstanding the force of the text example would hold here too.)

the nature of the case, impossible, Posner and others recommend what they call "mimicking" the market, which means imposing the result they believe a market would have reached. They concede, therefore, or rather insist, that information about what parties would have done in a market transaction can be obtained in the absence of the transaction, and that such information can be sufficiently reliable to act on.

I assume, therefore, that we have that information in the book case. We know that there will be a gain in social wealth if we transfer the book from Derek to Amartya. We know there will be less gain (because of what either or both might otherwise produce) if we allow them to "waste" time haggling. We know there can be no more gain in social wealth if we force Amartya to pay anything to Derek in compensation. (Each would pay the same in money for money.) If we think that Society 2 is in no respect superior to Society 1, we cannot think that social wealth is a component of value.

It may now be objected, however, that wealth maximization is best served by a legal system that assigns rights to particular people, and then insists that no one lose what he has a right to have except through a voluntary transaction. Or (if his property has been damaged) in return for appropriate compensation ideally measured by what he would have taken for it in such a transaction. That explains why someone who believes that wealth maximization is a component of value may nevertheless deny that Society 2 is in any way better than Society 1. If we assume that Derek has a right to the book under a system of rights calculated to maximize wealth, then it offends, rather than serves, wealth maximization to take the book with no compensation.

I shall discuss later the theory of rights that is supposedly derived from the goal of maximizing wealth. We must notice now, however, that the goal justifies only instrumentally rights like Derek's right to the book. The institution of rights, and particular allocations of rights, are justified only insofar as they promote social wealth more effectively than other institutions or allocations. The argument for these rights is formally similar to the familiar rule-utilitarian account of rights. Sometimes an act that violates what most people think are rights—such as taking Derek's book for Amartya—improves total utility. Some rule utilitarians argue that such rights should nevertheless be respected, as a strategy to gain long-term utility, even though utility is lost in any isolated case considered by itself.

This form of argument is not to the point here. I did not ask whether it is a wise strategy, from the standpoint of maximizing social wealth in the long run, to allow tyrants to take things that belong to one person and give them to others. I asked whether, in the story of Amartya and Derek, Society 2 is in any respect superior to Society 1. The utilitarian, assuming that Amartya would get more utility than Derek would lose, might reply that it is. He

might say that, if we confine our attention only to this case, Society 2 is in every way better because there is more happiness, or less suffering, or whatever. He would add, however, that we should nevertheless impose on the tyrant a rule forbidding the transfer, because, although the act makes the immediate situation better, its consequences will make the situation in the future much worse. This distinction is important, because a utilitarian who takes this line must concede that, if the tyrant's act would not have the long-term adverse utility consequences he supposes (because the act could be kept secret, or because a suitably limited exception to the general rule he endorses could be carved out and maintained), then the tyrant *should* so act. Even if the utilitarian insists that a rule forbidding the transfer in all cases will improve long-term utility, he still concedes that something of value is lost through the rule, namely the utility that would have been gained but for the rule.

The wealth maximizer's answer to my question about Amartya and Derek—that economic analysis would not recommend a set of legal rules permitting the tyrant to transfer the book without compensation—is simply an evasion. Like the reply that market exchanges provide the most reliable information about value, it misunderstands the force of my story. I still ask whether the situation is in any respect better if the transfer is made. If Society 2 is not in any way superior to Society 1—considered in themselves—then social wealth is not even one among several components of social value.

I have assumed so far, however, that you will agree with me that Society 2 is not superior. Perhaps I am wrong. You may wish to say that a situation is better, *pro tanto,* if goods are in the hands of those who would pay more to have them. If you do, I suspect it is because you are making a further assumption, which is this: if Derek would take only $2 for the book and Amartya would pay $3, then the book will provide more satisfaction to Amartya than it does to Derek. You assume, that is, that the transfer will increase overall utility as well as wealth. But Posner, at least, is now explicit that wealth is conceptually independent of utility. He now allows that interpersonal comparisons of utility make sense and holds that increases in wealth may produce decreases in utility and vice versa.[6] (He relies on cases in which this is so as part of his argument that economic analysis is superior to utilitarianism as a moral theory.)

I must thus make my example more specific. Derek is poor and sick and miserable, and the book is one of his few comforts. He is willing to sell it

[6] Posner, *supra* note 4. In Posner, *supra* note 1, the sense of interpersonal comparisons is challenged along familiar grounds. No effort is made in the later article to reconcile the two positions.

for $2 only because he needs medicine. Amartya is rich and content. He is willing to spend $3 for the book, which is a very small part of his wealth, on the odd chance that he might someday read it, although he knows that he probably will not. If the tyrant makes the transfer with no compensation, total utility will sharply fall. But wealth, as specifically defined, will improve. I do not ask whether you would approve the tyrant's act. I ask whether, if the tyrant acts, the situation will be in any way an improvement. I believe it will not. In such circumstances, that goods are in the hands of those who would pay more to have them is as morally irrelevant as the book's being in the hands of the alphabetically prior party.

Once social wealth is divorced from utility, at least, it loses all plausibility as a component of value. It loses even the spurious appeal given to utilitarianism by the personification of society. It is sometimes argued by utilitarians that, since an individual is necessarily better off if he has more total happiness in his entire life, even though less on many particular days, so a society must be better off if it has more total happiness distributed across its members even though many of these members have less. That is, I think, a bad argument in two different ways. First, it is not true that an individual is necessarily better off if he has more total happiness over his life without regard to distribution. Someone might well prefer a life with less total pleasure than a life of misery with one incredibly ecstatic month, and perjured Clarence would not have relived the agony of his dream "Though 'twere to buy a world of happy days."[7] Second, society is not related to individual citizens as an individual is related to the days of his life. The analogy is, therefore, one way of committing the ambiguous sin of "not taking seriously the difference between people."

The parallel argument on behalf of social wealth maximization is, however, much worse. It is false that even an individual is necessarily better off if he has more wealth, once having more wealth is taken to be independent of utility information. Posner concedes that improvements in wealth do not necessarily lead to improvements in happiness. He should also concede that they sometimes lead to a loss in happiness because, as he says, people want things other than wealth, and these further preferences may be jeopardized by more wealth. That is, after all, a staple claim of sentimental fiction and quite unsentimental fairy tales. Suppose, therefore, that an individual faces a choice between a life that will make him happier (or more fulfilled, or more successful in his own lights, or whatever) and a life that will make him wealthier in money or the equivalent of money. It would be irrational of him to choose the latter. Nor—and this is the crux—does he lose or sacrifice anything of value in choosing the former. It is not that he should,

[7] *Richard III,* Act I, scene iv, 1.6.

on balance, prefer the former, recognizing that in the choice he sacrifices something of value in the latter. Money or its equivalent is useful so far as it enables someone to lead a more valuable, successful, happier, or more moral life. Anyone who counts it for more than that is a fetishist of little green paper.

IV

It is important to notice that the Derek-Amartya story shows the failure not only of the immodest but also of the modest version of the theory that social wealth is a component of value. For the story shows not merely that a gain in wealth may be outweighed by losses in utility or fairness or something else. It shows that a gain in social wealth, considered just in itself, and apart from its costs or other good or bad consequences, is no gain at all. That denies the modest as well as the immodest theory. I shall therefore take this opportunity to comment on a familiar idea that, on its most plausible interpretation, presupposes the modest theory, that is, that social wealth is one among other components of social value.

This is the idea that justice and social wealth may sensibly be traded off against each other, making some sacrifice in one to achieve more of the other. Professor Calabresi, for example, begins *The Costs of Accidents* by noticing that accident law has two goals, which he describes as "justice" and "cost reduction," and notices also that these goals may sometimes conflict so that a "political" choice is needed about which goal should be pursued.[8] The same point is meant to be illustrated by the indifference curves I have seen drawn on countless blackboards, on space defined by axes one of which is labeled "justice" (or sometimes "morality") and the other "social wealth" (or sometimes "efficiency").

Whose indifference curves are supposed to be drawn on that space? The usual story speaks of the "political" or "collective" choice in which "we" decide how much justice we are willing to give up for further wealth or vice versa. The suggestion is that the curves represent individual choices (or collective functions of individual choices) over alternative societies defined as displaying different mixes of justice and wealth. But what sort of choice is the individual—whose preferences are thus displayed—supposed to have made? Is it a choice of the society in which he would like to live, or the choice of the society he thinks best from the standpoint of morality or

[8] Guido Calabresi, The Costs of Accidents (1970). Professor Calabresi tells me that, though the passage I cite has often been taken to call for some trade-off between justice and cost reduction, that was not his meaning. But see an exchange of letters between him and me forthcoming in the Hofstra Law Review.

some other normative perspective? We shall have to consider these two interpretations in turn.

If the former, self-interest might be thought to enter directly in a way antagonistic to justice, as in the case of an individual deciding whether to lead a perfectly just life that will leave him poor, or a life in which he sometimes acts unjustly but in which he is richer, or a life of many very unjust acts in which he is richer still. Since I believe that people can (and often do) act in a way they know is unjust, I acknowledge that individuals "trade off" justice against personal welfare in their own lives. But what sense does it make to suppose that they trade off justice against, not welfare in their own lives, but wealth over the society as defined by economic analysis?

Perhaps the point is that an individual chooses a society that has more rather than less wealth as a whole because the antecedent probability is that he will have more wealth personally in a richer society. This makes the supposed preferences something like those displayed in Rawls's original position. Individuals choose a mix of justice and efficiency with an eye to maximizing their individual utility under conditions of dramatic uncertainty; or, rather, trading off gains in their prospects, so conceived, against losses in the just character of the society. (This is, of course, very different from the choice made in Rawls's own version of the original position, in which people maximize their antecedent self-interest not as some trade-off against justice, but as part of a demonstration—by Rawls, not them—of what principles constitute justice.)

Individuals in this exercise, of course, would be ill-advised to take gains in social wealth as some index to gains in their own antecedent welfare, even under conditions of uncertainty about the role they will occupy. Just under those conditions, they will use a very different index. Which index they will use will depend upon whether they decide to draft their preferences over society in the language of utility or the language of wealth. Which language they use—the language of utility or the language of individual wealth—will depend upon calculations about which vocabulary will, in practice, maximize antecedent welfare. If they choose the language of utility, then, as Hirsanyi and Mackie and others argue, they will choose, as the surrogate for maximizing their own antecedent welfare, average utility. If they choose (as I think they should) the language of individual wealth, they will certainly not choose, as that surrogate, that function of individual wealth constituted by social wealth as defined by the economic analysis of law. That would be crazy. Nor will they choose, for that surrogate, average individual wealth, because of the effects of marginal utility. They would be better advised to choose something much closer to maximim of individual wealth, for example, which is Rawls's second principle. I

do not think that they would choose only maximim—they would allow some gains for those better off, if sufficiently large, to outweigh small losses to those worse off. But if their only choice were maximin or highest social wealth, they would certainly choose the former.

But surely this is all irrelevant. Calabresi and others contemplate actual political choices—they suppose that the economic analysis of law is useful because it shows how much wealth is lost if some other value is chosen. But in that case we cannot understand the axis of wealth or efficiency, in the indifference curves as generally offered, as a surrogate for judgments about antecedent individual welfare under conditions of uncertainty. We must understand the axis as representing judgments about individual welfare, to be traded off against justice, as things actually stand. *No* particular individual will, then, be concerned about social wealth (or, indeed, about Pareto efficiency). It makes no sense for him to trade off anything, let alone justice, for *that*. He will be concerned with his individual fate, and since, by hypothesis, he now knows his actual position, he can choose amongst societies by trading off justice against increases in his individual welfare in these different societies. *Social* wealth (or Pareto efficiency) simply plays no role in these calculations.

Let us turn to the second interpretation of the supposed trade-off choice. An individual is supposed to be choosing which mix of justice and wealth represents, not the society in which he, as an individual with both moral and self-interested motives, would prefer to live, but the morally best society, all things considered. The very idea of a trade-off between justice and wealth now becomes mysterious. If the individual is to choose the morally best society, why should not its justice alone matter?

We might expect one of two replies to that question. It might be said, first, that justice is not the only virtue of a good society. It surely makes sense, from a normative perspective, to speak of the trade-off between justice and culture, and also to speak of the trade-off between justice and social wealth, as two distinct, sometimes competing social virtues. The second reply is different in form but similar in spirit. It suggests that, when people speak of a trade-off between justice and social wealth, they use "justice" to refer to only part of what that word means in ordinary language and in political philosophy—that is, they use it to refer to the distributional and meritocratic or desert features of justice in the wider sense. They mean the trade-off between those specific aspects of justice and other aspects that are comprehended under "wealth maximization."

These two replies are similar in spirit because they both assume that wealth maximization is a component of social value. In the first, wealth maximization is treated as a component competitive with justice and, in the second, as a component of justice but competitive with other compo-

nents of that concept. Both replies fail, for that reason. It is absurd to consider wealth maximization to be a component of value, within or without the concept of justice. Remember Derek and Amartya.

Of course, if someone denies that wealth is a component of value, but argues that it is sometimes instrumental in achieving value, in one of the senses we distinguished in Part II, he would not speak of a trade-off between justice and wealth. Or rather he would be confused if he did. It makes no sense to speak of trading off means against ends, or of people being indifferent about different mixes of a particular means and the end it is supposed to serve. Someone who speaks this way must have in mind an entirely different point. He might mean, for example, that sometimes we achieve more of the desired end if we aim only at what is (in this sense) a means. That is the "false-target" instrumental theory I mentioned earlier and will discuss later. It entirely distorts that theory to describe it as requiring some trade-off between justice and anything else.

But suppose I was wrong to take the trade-off described in the familiar indifference curves, or in texts like Calabresi's, to be a matter of individual preferences, or some collective function of individual preferences. Perhaps the choice *is* meant to be the choice of society as a whole, conceived as a composite entity. I think that the choice is mentally represented this way, although not reflectively, by many of those who speak of trade-offs between justice and wealth. They have a personified community in mind, as the reference of the "we" in the proposition that "we" want a society of such-and-such sort. Of course, that picture must be disowned when made explicit. It is a silly and malign personification.

Even if society is personified in this silly way, it remains mysterious why society so conceived would want a trade-off between justice and wealth. First, the choice of wealth, taken to be independent of utility information, would make no more sense for society as a composite person than it does for individuals as actual people. Second, and more interesting, the reference of "justice" would be lost. Justice (at least when the trade-off is in question) is a matter of distribution—of the relation among individuals who make up the society, or between the society as a whole and these individuals. Once we personify the society so as to make the social choice an individual choice, there is no longer anything to be considered under the aspect of justice. Society personified can, of course, still be concerned about questions or ordering or distribution among its members. But the dimensions of such orderings do not include that of justice. An individual cares about the distribution of benefits or experiences over the days of his life. But he does not care under the aspect of justice.

None of these interpretations of the trade-off between justice and wealth makes sense. I hope the idea, however familiar, soon disappears from eco-

nomic and political theory. My present point is more basic. The argument thus far is as destructive of modest normative claims for economic analysis, such as those Calabresi suggests, as it is of the most full-blown immodest claims of Posner.

V

I now turn to the claim that a society with more wealth is better because wealth bears some important instrumental connection—whether as cause, as ingredient, or as false-target—to some independent component of value. I characterized certain versions of the instrumental claim as "strong," and we must be careful to distinguish these from weaker claims. A weak instrumental claim argues merely that sometimes improvements in social wealth cause improvements of other sorts. That is plainly sometimes so, for a variety of reasons. If, for example, judges are able to increase wealth dramatically by some decision they reach, then in, perhaps, a quarter-century everyone then alive may be better off than he would have been if the gain had not been made, either because the increased wealth will be distributed by political action so that even the poor benefit, or because the same result is reached by some invisible hand mechanism with no direct political action. But the weak instrumental claim—that sometimes this will be so—is insufficient to argue that judges should accept wealth maximization as the single test for change in the common law, or even in some particular branch or division of the common law. That argument requires the strong thesis that judges who accept such a single test will produce more of what is independently valuable, like the amelioration of poverty, than if they were to adopt a more discriminating test and try to maximize wealth only in those cases in which they have some special reason to think that they would thereby increase the independent value.

This is an important point. The difference between a strong and a weak instrumental claim is not only measured in scope. A strong theory need not claim that judges must pursue wealth maximization as the only standard of their decisions in all cases at law, or even in all common law cases or all tort cases—although, of course, the more scope the claim has, the more interesting it is. But the theory must claim that judges should pursue wealth single-mindedly over some class of cases specified independently of the instrumental claim itself—that is, specified other than as "the cases in which maximizing wealth will in fact produce the true goal." If the normative limb of economic analysis does not include at least some strong instrumental claim of that sort—if it rests only on the weak and unelaborated claim that sometimes pursuing wealth will lead to other good results—then the normative limb of the theory is boring and misleading: boring because no

one will dispute the claim, and misleading because the theory should then be named, not after wealth, but after the so-far unspecified true goal that wealth is taken sometimes to serve.

I shall assume, therefore, that if economic analysis rejects wealth as a component of value, and argues only that wealth maximization is instrumental towards some other conceptually independent goal or value, it argues for that instrumental connection in some strong form, though I shall not assume that the strong claim it makes has any particular scope. The strong thesis need not suppose (of course, it need not deny) that in every case a judicial decision that maximizes social wealth will improve the true goal. But it must show why, if in some cases wealth maximization will not have that desirable effect, it is nevertheless wise strategy to pursue wealth maximization in all cases within the scope of the claim.

Any strong claim, even of limited scope, must specify the independent goal or value that it supposes is advanced instrumentally by maximizing social wealth. Supporters of economic analysis might have any number of independent values in mind, or some structured or intuitionistic mix of different independent values. We cannot test the instrumental claim for wealth maximization until the independent value or mix of these is at least roughly specified.

It is surprising that, in spite of the supposed popularity of economic analysis, there have been few attempts to do this. This failure supports my view that many lawyers have uncritically assumed that wealth is at least a component of value. But in a recent article, and much more clearly in remarks prepared for a recent conference, Posner suggests different instrumental claims that he, at least, might be tempted to make.[9] He suggests that wealth maximization is a value because a society that takes wealth maximization to be its central standard for political decisions will develop other attractive features. In particular, it will honor individual rights, encourage and reward a variety of "Protestant" virtues, and give point and effect to the impulses of people to create benefits for each other. Posner believes that it will do better in promoting these attractive traits and consequences than a society that takes, as its central standard for political decisions, either utilitarianism or some "Kantian" position.[10]

The argument has the form of a strong instrumentalist claim of the causal variety. It has very wide scope. It specifies a set of features of society—individual rights, agreeable virtues, and humane instincts—that can plausibly be taken to be components of value. It then suggests that the

[9] Posner, *supra* note 4.

[10] Posner, *supra* note 4, defines "Kantian" so as to describe a political theory that rejects "any form of consequentialism." (*Id.* at 104.) Kant is not, on this definition, a Kantian.

"right" mix of these will be best obtained by a single-minded attention to wealth maximization as a standard for political decisions, including judicial decisions. The trouble begins, however, when we ask what arguments he might offer to support this strong and wide instrumentalist claim.

We may begin with the claim that wealth maximization will encourage respect for individual rights. A society that sets out to maximize social wealth will require, of course, some assignment of rights to property, labor, and so forth. That is a conceptual requirement, because wealth is measured by what people are willing to pay, in money or its equivalent, but no one can pay what he does not own, or borrow if he has nothing to pledge or if others have nothing to lend. Society bent on maximizing wealth must specify what rights people have to money, labor, or other property so that it can be determined what is theirs to spend and, in this way, where wealth is improved. A society is, however, not a better society just because it specifies that certain people are entitled to certain things. Witness South Africa. Everything depends on which rights society recognizes, and on whether those rights should be recognized according to some independent test. It cannot, that is, provide an instrumental claim for wealth maximization that it leads to the recognition of certain individual rights, if all that can be said, in favor of the moral value of these rights, is that these are the rights that a system of wealth maximization would recognize.

There is, however, a danger that Posner's argument will become circular in that way. According to the economic analysis of law, rights *should* be assigned instrumentally, in such a way that the assignment of rights will advance wealth maximization. That is, indeed, the principal use of the standard of wealth maximization in the judicial context. Recall the case of the doctor and the candymaker. The question put to the court was whether the doctor should be recognized to have the right to stop the noisy machine. Economic analysis does not suppose that there is some independent moral argument in favor of giving or withholding that right. So it *cannot* be claimed, in favor of economic analysis, that it points to what is independently, on moral grounds, the right answer. On the contrary, it claims that the right answer is right only because the answer increases social wealth.

Nor does Posner limit the scope of that argument—that assignments of rights must be made instrumentally—to what might be called less important rights, like the right to an injunction in nuisance or to damages in negligence. On the contrary, he is explicit that the same test must be used in determining the most fundamental human rights of citizens, including their right to life and to control their own labor rather than be slaves to others. He counts it an important virtue of wealth maximization that it explains why people have those rights. But if wealth maximization is only to be an instrumental value—and that is the hypothesis now being

considered—then there must be some independent moral claim for the rights that wealth maximization recommends. These rights cannot have a moral claim on us simply because recognizing those rights advances wealth.

Let us, therefore, suppose that Posner believes people have a right to their own bodies, and to direct their own labor as they wish, for some independent moral reason. Suppose he also argues that wealth maximization is of instrumental value because a society that maximizes wealth will recognize just those rights. There remains a serious conceptual difficulty. The argument supposes that a social order bent only on wealth maximization, which makes no independent judgments about the fairness of distributions of resources, will recognize the rights of the "natural" owner to his own body and labor. That is true only if the assumption of those rights can be justified by the wealth maximization test, which requires that if rights to the "natural owner's" body or labor are in fact assigned to someone else, he will nevertheless be willing and able to purchase these rights, at least, if we assume no transaction costs.

We cannot, however, speculate intelligibly about whether someone would purchase the right to his own labor unless we make some assumptions about the distribution of wealth. Posner acknowledges this. Indeed, he uses this example—someone's ability to purchase the right to his own labor if he is made a slave—to make the point that whether someone can purchase that right depends on his and others' wealth, and in particular how large a share of that wealth is that right. He says that in such a case "economic analysis does not predict a unique allocation of resources unless the initial assignment of rights is specified."[11] If A is B's slave he may not be able to buy back the right to his labor, although if he were not B would not be able to buy that right from him. If economic analysis makes someone's initial right to his own labor depend upon whether he would purchase the right if assigned to another, that right cannot be "derived" from economic analysis unless we already know who initially has the right. This appears to be a serious circle. We cannot specify an initial assignment of rights unless we answer questions that cannot be answered unless an initial assignment of rights is specified.

Can we break out of this circle? We might, for example, stipulate that we are to ask our question about who would purchase what in a state of nature when no one has any rights to anything. I assume that means not only that no one already owns his own labor, but also that no one has any money, the equivalent of money, or anything else. In that case, the question is without meaning, or, if it has meaning, the answer is that no one would purchase anything.

[11] *Id*. at 108.

We might more plausibly stipulate that we are to ask the question *now*, that is, at a moment when *other* rights, including wealth, are in place (which does not preclude, of course, asking it again later when we suspect that a different answer might be available). There is, perhaps, a determinate answer to the question of who values the right more under these circumstances. In order to test the claim—that wealth maximization would (determinately) assign the right to labor to the "natural owner"—we suppose that the right to the labor of a certain easily distinguished group of people (say those with IQs over 120) is taken from them (perhaps by some anti-emancipation proclamation) and assigned to others. The present wealth of those who have lost these rights (as well as the present wealth of those who have gained them) is not otherwise disturbed. Can we say that at least most of those who have lost their rights would now repurchase them or would but for transaction costs?

We must remind ourselves that willingness to purchase these rights supposes ability to purchase them—the ability to pay what those who have the rights would ask in the market. It may be—indeed it would be for most people today—impossible to repurchase the right to their labor, because the value of that labor represents more than half of their present wealth. Could they borrow, in the money market, the necessary funds? Posner speaks to this possibility. He says, "No doubt the inherent difficulties of borrowing against human capital would defeat some efforts by the natural owner to buy back the right of his labor . . . even from someone who did not really value it more highly than he did—but that is simply a further reason for initially vesting the right in the natural owner."[12] These "inherent difficulties" must be transaction costs or other market imperfections, because Posner is very strict about how economic analysis must understand the verb "to value." Someone values something more than someone else (and the system of economic analysis depends on this) only if he is willing (and able) to pay more for it. If (for reasons other than market imperfections) the natural owner is unable to pay what the owner of the right would take, then he does *not* value it more.

So let us assume that the "inherent difficulties" can be overcome so that someone who has lost the right to his labor can borrow against the discounted value of his future labor. Will he thereby gain enough capital so that we can be confident that he (or most people in his position) will be able to purchase the right to his labor back from someone else? Almost certainly not, because the *monetary* value of his future labor is unlikely to be worth more to him, for this purpose, than it is to someone else.

Suppose someone called Agatha who is poor but who can write detective

[12] *Id.* at 125-26.

stories so brilliantly that the public will relish and pay for as many books as she can possibly write. Suppose the right to Agatha's labor is assigned to Sir George. That means that Sir George can direct the way Agatha's labor is to be used: she is his slave. Sir George will, of course, be an enlightened slave owner, in the sense that he will not work Agatha so hard that the total value of what she produces declines. But he will work her just short of that point. Suppose that Agatha, if she had the right to her own labor, would work as an interior designer, at which work she would make much less money but find her life more satisfying. Or suppose that she would write many fewer detective stories than she could, sacrificing the additional income to spend time at her garden. At *some* point she would rather stop writing to enjoy what she has made, rather than make marginally more money, but have no time to enjoy anything. She may, perhaps, work somewhat more effectively while she works if she is her own master—but she will probably work at a less lucrative job, and almost certainly will work less.

If she tells the bank manager that she intends to design interiors, or to work at her garden, she will not be able to borrow anywhere near the funds necessary to buy the right to her own labor from Sir George. If she does not, but leads her life that way anyway, she will soon be in default on debt service. She can borrow enough money, even to make Sir George indifferent about selling her the right to her labor, only by undertaking to lead a life as distasteful to her as the life she would have led under Sir George. She will have to perform almost exactly the labors that he, as a master of enlightened self-interest, would prescribe. She will cease to be his slave only by becoming the slave of the First National Bank (of Chicago, of course).

Indeed, her situation is even worse than that, because I have ignored the interest the bank will take. (The rate may be high if others are at the same time trying to find capital to buy back the right to *their* labor.) So her ability to borrow enough to make Sir George indifferent will depend upon his other investment opportunities, and (if he is confident about her abilities) his risk aversion. Nor is it by any means plain that, if she could borrow enough, she would. She gains very little actual control over the conduct of her life, as we have seen, and she loses a considerable degree of security. The main value of freedom is the value of choice and self-direction, and if she starts her career a slave she will never be able to recapture more than a token amount to these. We cannot be confident (to understate) that a thorough analysis would justify the conclusion that Agatha either could or would buy back the right to her labor. We therefore cannot claim that economic analysis supports giving her that right in the first place.

Readers will no doubt think that I have gone mad some time ago. They will think that the character of the arguments I have been making demeans the case against the normative aspect of the economic analysis of law. Many will think it more important to say that a theory that makes the moral value of slavery depend on transaction costs is grotesque. They are right. But my present point is not that wealth maximization, taken seriously, may lead to grotesque results. It is the more limited point that this particular effort to show that wealth maximization has strong instrumental value wholly fails.

Posner has another argument we should notice here. He gives some place to a different instrumental claim: wealth maximization has value because a society that seeks only social wealth maximization will encourage attractive personal virtues, particularly the virtue of beneficence. This is not an unfamiliar argument. Defenders of capitalism often call attention to how the "Protestant" virtues of industry and self-reliance thrive in a capitalist system, but they do not give prominence to specifically altruistic virtues. It is this feature of the claim that makes Posner's account so paradoxically attractive.

Posner's argument is straightforward: in a society dedicated to wealth maximization, people can improve their position only by benefiting others, because when someone produces goods and services others buy, he must be producing some benefit for them as well as for himself. The argument does not specify the metric it assumes for testing whether a society bent on wealth produces more beneficial-for-others activity than a society that encourages a more direct altruism. It is not easy to see which metric would be appropriate. Even if wealth-produced-for-others is taken as the measure, with no allowance for distribution, it is far from clear that more wealth will be produced by people for other people, as distinct from themselves, under wealth maximization than under a system of taxation and redistribution, even though the latter produced less wealth altogether. Surely, welfare-for-others is a better measure of moral achievement than simply wealth-for-others, and, because of marginal utility, welfare-for-others is a standard that includes distributional requirements. It is far from plain that wealth maximization will produce more total welfare-for-others activity than other, more compromising, economic and political structures.

But that is an empirical question. We need not pursue it here, moreover, because of a more fundamental flaw in Posner's argument that wealth maximization is of instrumental value because it produces people who benefit others. For the moral value of beneficial activity, considered in itself, consists in the will or intentions of the actor. If he acts out of a desire to improve the welfare of others, his act has inherent moral value even if he does not benefit others. But of course it has no inherent moral value if he

acts with the intention of benefiting only himself. Posner makes plain that his production-for-others claims have nothing to do with the other-regarding intentions of actors in the economic process. He supposes, on the contrary, that they will act to maximize benefit to themselves, benefiting others only through their inability to absorb every last bit of the consumer surplus, as they would like to do for themselves. The better someone is at personal wealth maximization—the more he displays the skills and talents to be rewarded in the system—the less his acts will benefit others, because the more of the surplus will he be able to retain from each transaction or enterprise. Any benefit to others comes from the invisible hand not good will. It cannot be the intrinsic value of wealth-producing acts that recommends wealth maximization.

VI

It is, perhaps, the consequences of these acts. Perhaps the individuals seeking wealth only for themselves will produce a distribution that is just. This suggestion, in its widest scope, supposes that a society pursuing wealth maximization will achieve a closer approximation to ideals of distributive justice, for some reason, than a society not single-mindedly pursuing that goal. These ideals of distributive justice, of course, must be specified, or at least conceived, independently of wealth maximization. It will not do to say that distributive justice is whatever state of affairs is produced by wealth maximization. For then the claim that wealth maximization leads to distributive justice would be merely tautology.

So this new interpretation of the instrumental account must be completed by at least a rough specification of justice. It would be natural for an economic analyst to choose one of the several accounts of justice already in the traditions of political philosophy—highest total or average utility, for example, or equality, or maximin over welfare or wealth, or some meritocratic theory. The theory selected must be a patterned rather than a historical theory, to use Nozick's useful distinction. Historical theories argue that a distribution is just, whatever inequalities or other features it displays, if it is reached in accordance with correct principles of justice in acquisition and transfer. Patterned theories argue that a distribution is just only if it conforms to some pattern that can be specified apart from the history of how that distribution occurred. Wealth maximization specifies a patterned rather than a historical test for the assignment of rights: the decision whether the doctor or the candymaker has the right each seeks is to be made with a pattern in view—goods should be in the hands of those who would pay most to have them. It is almost incoherent to propose that a

patterned distribution might be instrumental in achieving a historically contingent distribution.

The defender of wealth must thus choose some patterned conception of justice, like highest utility, equality, maximin, meritocracy, or desert. Posner disclaims the first three of these specifically. Merit or desert theories are more congenial to his spirit, so we will consider these first.

Meritocratic theories hold that justice consists in that distribution in which people are rewarded in accordance with their merits. We now suppose that wealth maximization might be said to be of strong instrumental value because (through an invisible hand or false-target mechanism) a society whose laws seek only wealth maximization will produce the required meritocratic distribution, or come closer to it than any alternative system. But we must now distinguish between two conceptions of merit such an argument might employ. The first we might call an independent conception of merit. It requires that we be able to state what counts as merit independently of the wealth maximization process, so that it becomes an empirical hypothesis that wealth maximization rewards merit so stated. But for *any* list of independent merits that empirical hypothesis must fail, because which abilities or traits will be rewarded in any particular community at any particular time is a matter of technology, taste, and luck. Consider that set of talents necessary consistently to hit a breaking pitch. If any list of independent merits does not include that set, then it will be false that in our society wealth maximization rewards merits better than alternatives. Rod Carew will be rewarded, in such a system, much more highly than almost everyone else who ranks higher in the set of merits we do list.

If, however, we list that set of talents as merits, it will be false that wealth maximization characteristically rewards merits. That set of talents was not rewarded before baseball developed as it has, is not now rewarded where baseball has not so developed, and will not be rewarded if baseball declines and disappears. We can generalize: since which talents are rewarded by the market is highly contingent on a variety of factors, the pursuit of efficiency cannot be relied on to reward any particular set of these fixed as independent merits over time. But neither can it be relied on to disregard any particular set.

I shall call the second conception of merit the dependent conception. It holds that merit is constituted by the set of talents that enables one to succeed in the market from time to time. Some of these talents are relatively fixed, such as industry, shrewdness, and, perhaps, greed. Typically, although not inevitably, one does better with industry or shrewdness than without it. Other talents become merits only by virtue of transient tastes and luck; they are merits for a time because they enable one to produce what others take to be benefits to themselves and are willing and able to

buy. Under the dependent conception of merit, it *is* true that a market economy geared to wealth maximization will reward merits. It is too true, for under the dependent conception the instrumental claim has collapsed into tautology.

At least for Posner, therefore, we cannot find any suitable independent conception of justice in the literature of political philosophy. He makes a wide claim for wealth maximization, but he has rejected all the conceptions that do not make that wide claim either plainly false or trivial. What about pluralistic conceptions of justice? I mean theories that disclaim any single value, like utility or equality or merit, as making up all of justice in distribution, but instead argue that a truly just distribution will achieve a sensible mix of several of these values. The just distribution, on a pluralistic conception, will be one in which the average level of welfare is reasonably high, in which there is not too much inequality, and in which what people have is at least roughly related to how hard they have worked or how much they have produced. It may not be possible to specify the exact mix of the different components of the just society. But someone may claim to know it when he sees it. Is it sensible to say that wealth maximization is instrumentally related, in the strong sense, to some such pluralistic conception of justice?

The danger is evident enough. The instrumental claim completed in this way is in danger of becoming a tautology once again, unless the pluralistic conception is stated clearly enough to allow that claim to be tested empirically. That is close to impossible. Let us suppose that single-minded wealth maximization, in a particular society, would produce a certain precise cardinal level of average utility, a specific inequality factor (measured, for example, in Gini coefficients), and a determinate correlation between merit, somehow defined, and wealth. A critic now proposes a compromise with wealth maximization—for example, by a piece of redistribution that lowers the total wealth of the community. That compromise would produce slightly less average utility, slightly less inequality, and a different correlation between merit and wealth. Each of these factors, that is, becomes somewhat, but not radically, different from the result under single-minded wealth maximization. Now the partisan of wealth maximization on this instrumental argument must suppose that the original mix of these different components of social value is better than the new mix. It is not enough for him to suppose that the original mix is better than the maximand of any of the three components: better than the society in which average utility is as high as possible, or inequality as low as possible, or people are never rewarded except in proportion to merit. He must also believe it better than the different mixes of these three desiderata that would be achieved under political and economic systems less uncompromising than his single-minded wealth production.

His belief is implausible. It is highly indeterminate, *ex ante,* which cardinal level of average utility, which coefficient of inequality, and which correlation of wealth to merit (on any nontautologous definition of merit) will be produced by a program of wealth maximization. It is also highly indeterminate which mix of these putative desiderata would be achieved by any discrete compromise with wealth maximization. It is, therefore, implausible that a particular mix exists such that it is *both* independently preferable, on moral grounds, to possible alternatives, and also antecedently more likely to be secured by wealth maximization than by discrete compromises. My point is not that it is impossible antecedently to *describe* the "best" mix of components, other than in the I-know-it-when-I-see-it fashion—although that is a bad sign. But rather that at the level of fine tuning necessary to distinguish the results of wealth maximization from the results of compromises, there simply *is* no one "best" mix antecedently more likely to be produced by one rather than the other of these social techniques. The pluralistic instrumental account is weaker than a straightforward hitching of wealth maximization to a traditional theory—for example, utilitarianism—might be. In the latter case the goal that different instrumental theories compete to maximize is at least specifiable.

There is an important and more general point here. Even patterned theories of justice are likely to leave something to the contingencies of history. At a certain level of fine tuning, for example, even a strict egalitarian will admit that the result of a trade between equals respects equality just because it is a trade among equals, rather than because its results are those specifically demanded by equality. I suspect that partisans of wealth maximization also believe that a particular distribution is just because it is the distribution achieved by wealth-maximizing rules, and not *vice versa.* Surely that suspicion is supported by the great bulk of writing exploring the economic analysis of law. But of course that judgment takes us back to wealth as a component of value. It cannot be supported by any instrumental defense of wealth maximization. It supposes, instead, that wealth maximization is a fair procedure whose results are just, as an egalitarian supposes that a trade between equals is an inherently fair procedure. So a wealth maximizer who holds that a distribution is just if it is the product of wealth-maximizing rules cannot rely on *any* instrumental justification of at least that aspect of his theory.

VII

We have been considering how the various forms of the instrumental claim for wealth maximization might be completed by specifying an independent conception of social value that wealth maximization promotes. I first set aside the utilitarian conception of justice because Posner explicitly

rejects that conception. But Posner's own suggestions—individual rights, individual virtue, and some impressionistic mix of different values—all fail, and although he has been the most explicit and extreme wealth maximizer among lawyers, his rejection of utilitarianism is not binding on the others. Does the utilitarian tradition offer a way of completing the instrumental defense of wealth?

I do not mean, in raising that question, to endorse utilitarianism in any of its various forms. On the contrary, it seems to me that utilitarianism, as a general theory of either value or justice, is false, and that its present unpopularity is well-deserved. It is not, however, a theory that can be rejected out-of-hand, by any argument as simple as the argument I used to dispose of the theory that wealth is a value in itself. It has enjoyed the support of a large number of sophisticated and sensitive philosophers. It is, therefore, worth asking whether a thorough-going utilitarian might be led to support wealth maximization on an instrumental basis.

Once again, we must be sensitive to the different types of instrumental theory. There are invisible-hand, ingredient, and false-target versions of the instrumental thesis available, and also versions of wider and narrower scope. The versions share, however, a common conceptual problem. Utilitarianism supposes that individual welfare levels are at least sometimes comparable, so that total or average utility levels can be ordered over various choices of social programs. Economists, as a group, have been skeptical about interpersonal comparisons of utility. If utilitarianism is to be the motor of wealth maximization, then wealth maximizers must forgo that skepticism and move even further from present orthodoxy in economics. But when we admit generalizations about comparisons of welfare within large communities—like the generalization that the marginal utility of wealth declines—then any broad version of the utilitarian-instrumentalist theory becomes immediately implausible. It is implausible to think that a society that seeks wealth maximization single-mindedly will achieve more total utility than a society that seeks wealth maximization but puts an upper bound on the level of inequality it will tolerate in the name of social wealth.

So any plausible utilitarian-instrumentalist theory of wealth maximization must be a reasonably narrow theory. Let us construct a sample narrow theory tied to adjudication. This holds that a society whose judges decide hard cases at common law by choosing the rule expected to maximize social wealth will achieve more total utility in the long run than a society that chooses another discrete program for deciding such cases, including a society whose judges decide such cases by choosing the rule that can be expected to maximize total utility in the long run. This is a strong instrumentalist theory; it defines a group of political decisions (hard common law cases) such that officials are required to decide all such cases to

maximize wealth, rather than to ask, in each case, whether maximizing wealth in that case would promote utility. What sort of empirical evidence, or set of correlative assumptions, would support that theory?

The most eligible assumption considers selective wealth maximization as an ingredient rather than as a cause or false target of value. It supposes that if judges decided such cases so as to increase the total wealth, other institutions—perhaps legislatures—would then redistribute the increased total wealth to improve average or total utility. That chain of events is, no doubt, conceivable, once we accept that interpersonal comparisons of individual utility make sense in principle. It is not, however, inevitable. The political process might—for a variety of reasons—leave those who gain most from wealth maximization with their gains intact. We should, therefore, ask whether the utilitarianism-instrumental theory requires that legislatures actually redistribute to improve total utility, or whether it is sufficient, to support that theory, simply that they might do so.

Consider the following elaboration of the theory. Judges decide discrete common law cases against the background of a given distribution of wealth and legal rights. No decision a judge makes in a particular case will significantly affect that distribution. The best a judge bent on improving total utility can do is to improve the total supply of wealth. If the legislature finds some way to redistribute the increased wealth so as to optimize utility, well and good. If not, nothing has been lost. It is better to provide the legislature with an opportunity to improve utility, even if the opportunity may not be taken, than to do nothing.

Is this a good defense of our narrow theory? It rests on a large assumption: that there is nothing that judges can ever do directly to advance utility more than they can do simply by maximizing wealth, even when they know that the legislature will do nothing further to advance that goal itself. It assumes that judges would promote utility less overall, even in those circumstances, if they sometimes asked whether a less single-minded, more discriminating approach would improve utility in particular cases. It rests on the assumption that wealth maximization is a good false target for utility even when it is not a useful ingredient of utility. We may test that assumption in this way. Suppose someone suggests the following alternative program for adjudication. Judges should reach that decision, in hard cases at common law, that will promote utility better than any alternative decision. In some cases, perhaps most, that will be the wealth-maximizing decision and in some not. Everything depends on circumstances, and it is impossible to say in advance how often this theory will recommend non-wealth-maximizing decisions.

That is (in the sense defined) a weak instrumental theory of wealth maximization. Two questions arise. Will the weak theory ever recommend

a judicial decision the narrow strong theory would not? Will a society whose judges follow the weak theory produce more utility in the long run than a society that follows the strong one? The answer to the first of these questions will depend on a variety of issues, but is almost certainly, yes. Paternalism will provide occasions when the utility-maximizing rule differs from the wealth-maximizing rule. Suppose, for example, that the community will pay more for candy than for medical care lost through the noise of a candy machine, but the candy will be bad for its health and therefore its long-term utility. Future generations provide other occasions: once the utility of future generations is taken into account, even common law decisions—like those affecting the environment—may injure utility if they promote wealth in its present distribution. Quite apart from these factors, some common law decisions are potentially redistributive. Suppose a decision might either protect the workers of an ailing and, possibly, noncompetitive industry or hasten their unemployment by structuring rights in favor of a developing new industry? The wealth-maximizing decision might be the latter; the utility-promoting decision nevertheless the former.

If there are many occasions on which the two theories—weak and strong—would recommend different decisions, the answer to the second question is probably, no. It is, of course, true that false targets are sometimes good targets: we sometimes gain more by aiming slightly away from what we want, as a man bent on pleasure would do well not to aim directly at it. But that is not always or even usually so, and there seems, *a priori,* no more reason why it should hold in the case of courts than in the case of legislatures. If it is sometimes true that a legislature should choose a decision that does not maximize wealth, because it will nevertheless improve utility, there seems no reason why a court should not do so as well. The occasions on which a court has that choice are, perhaps, fewer, but that is plainly a different matter.

So the utilitarian-instrumental theory does seem to depend on some judgment that the legislature will act in cooperation with courts to redistribute, so as to produce more utility from the wealth the court provides. But if that is so, then the theory is seriously incomplete, because, so far as I know, that case has never been made. Nor is it immediately plausible. On the contrary, if the familiar assumption is right, that optimal utility would require much more equality of wealth than now exists in our country, the hypothesis that the legislatures, federal and state, have been busy redistributing in search of utility seems embarrassingly disconfirmed.

Even if that hypothesis were sound, much more would be needed to defend judicial wealth maximization in this way. We should still have to show why, when more utility could be produced by a decision aiming directly at utility, the court should aim instead at wealth. The hypothesis,

that the legislature will concern itself with utility, is not in itself a satisfactory answer. Would the gains in utility not be provided sooner and more securely in one step rather than two? There seems no reason not to prefer a weak instrumental theory: courts should decide to maximize utility, recognizing that the existence of legislatures ready to redistribute might mean that on some occasions wealth improvements might be the best means of improving utility in the long run. If any strong theory is preferred to that weak theory, it must, once again, rest on the (unsupported) false-target theory.

I have considered, in this part of the essay, whether a strong instrumental theory can defend wealth maximization, taken as the single-minded goal for at least a discrete part of adjudication, on the assumption that total utility is a value in itself. I argue that the hypothesis that it can seems weak, and is far from demonstrated. The same arguments apply, I think, against any strong instrumental claim for wealth maximization that takes maximin (on either the wealth or the utility space) rather than total utility to be a social value in itself. Once again, the question is raised why a weak theory, which encourages judges to seek maximin solutions directly, taking due account of the potential instrumental role of wealth maximization, would not be superior. No answer to that question has been provided, and it is not clear that there is a good one.

I should close this section, however, by noticing what I hope has been apparent in the discussion so far. The instrumental claims for wealth maximization are more plausible if they are harnessed to one of the nonmeritocratic-patterned theories of justice, such as utility or maximin, than to anything else. They cannot then be ruled out conceptually as, for example, Posner's instrumental claims can be. But they are still—certainly in the present state of play—claims with almost no foundation.

VIII

Economic analysis of law is a descriptive and a normative theory. Does the failure of the normative limb impair the descriptive limb? The latter offers an explanation of one aspect of human behavior, namely the decisions of common law judges in the cases economic analysis purports to explain. There are several modes (or, as some would say, levels) of explanation of human behavior. Some of these are nonmotivational. These include genetic or chemical or neurological accounts of either reflex or reflective behavior. The motivational modes of explanation may also be of different forms. The most straightforward is explanation from the agent's point of view, an explanation that cites the agent's goals or intentions and his belief about appropriate means. But there are more complex forms of

motivational explanation. Invisible hand explanations, for example, suppose that people act out of certain motives, and explain why, that being so, they collectively achieve something different from what they aim at individually. One class of Freudian explanations also assumes that people act out of motives, but holds that these motives are unconscious. These Freudian explanations are, nevertheless, motivational because their explanatory power hinges on the claim that people whose behavior is so explained are acting in a way best expressed by analogy to the behavior of people who hold such motives consciously. The theory is therefore dependent on an understanding of that straightforward motivational claim.

The argument of economic analysis, that judges decide hard cases so as to maximize social wealth, is not a genetic, chemical, neurological, or any other form of nonmotivational explanation. Nor is it an invisible hand explanation. It is true that something like an invisible hand explanation of why common law decisions promote social wealth has been offered,[13] but this is not part of the claims of Posner, Calabresi, or other proponents of economic analysis. To my knowledge economic analysis has never been presented as a Freudian analysis. But even if it had, that analysis would presuppose the sense of a straightforward claim. So economic analysis, in its descriptive limb, seems to rest on the sense and the truth of a straightforward motivational claim, which is that judges decide cases with the intention of maximizing social wealth.

But my arguments against the normative limb of economic analysis also call any such motivational claim into question. I did not argue that maximizing social wealth is only one among a number of plausible social goals, or is a mean, unattractive, or unpopular social goal. I argued that it makes no sense as a social goal, even as one among others. It is preposterous to suppose that social wealth is a component of social value, and implausible that social wealth is strongly instrumental towards a social goal because it promotes utility or some other component of social value better than would a weak instrumental theory. It is, therefore, bizarre to assign judges the motive either of maximizing social wealth for its own sake or pursuing social wealth as a false target for some other value. But a straightforward motivational explanation makes no sense unless it makes sense to attribute the motive in question to the agents whose behavior is being explained.

It follows that the descriptive claims of economic analysis as they have so far been presented, are radically incomplete. If they are to have descriptive power, they must be recast. They might be recast, for example, in some way appropriate to a weak instrumental claim. The arguments must then

[13] See the contributions of Rubin and Priest to the present issue of this journal.

become more discriminating. They must pick out particular classes of judicial decisions and explain why it was plausible for judges to suppose that a rule improving social wealth was likely, for that reason, to advance some independent social goal these judges valued—utility, maximin, the relief of poverty, the economic power of the country in foreign affairs, or some other goal. That becomes a claim of great complexity, for it involves, not only a detailed causal account, but detailed intellectual history or sociology. Did judges who developed the fault system in negligence or the system of strict liability suppose that their decisions would advance average total utility? Were these judges uniformly utilitarians, who would therefore count that an advantage? Does this explanation hold good only for a certain group of cases at a particular point in the development of the common law? Is it plausible to suppose that judges throughout some extended period held the same theory of social value? Is it plausible to suppose, for example, that they were utilitarians indifferently before, during, and after the academic popularity of that theory of social justice? That only scratches the surface of the kind of account that would be needed to give a weak instrumental explanation of judicial behavior along wealth maximization lines, but it is enough, perhaps, to suggest how far short the present literature falls. It has not achieved the beginning of a beginning.

It may now be objected, however, that I am asking for far too much, and unfairly discounting what has been done already. Suppose that the economic analysts have established an important correlation between the decisions that common law judges have reached in some particular area—say nuisance or negligence or contract damages—and the decisions that would have been taken by judges explicitly seeking to maximize social wealth. Suppose that, although not every decision actually made is the decision such a judge would reach, the great majority are. (I know this putative correlation is contested, and I assume it, in this section, *arguendo.*) It seems silly, not to say churlish, to turn our backs on all this information. We may hold the following attitude. No doubt it would be better still if an intellectual historical account could explain why actual judges acted in this way, either by showing that they took wealth maximization itself to be a component of value, or because they held a strong instrumental theory of wealth maximization, or a weak instrumental theory that had the consequences discovered. But the correlation, in and of itself, advances our understanding of the legal process to an important degree.

I think this attitude is wrong. It is wrong because a correlation of this sort has no explanatory power unless it is backed by some motivational hypothesis that makes independent sense. Suppose the following exercise. Let us construct a binary alphabetical priority sequence for all cases ever decided by the highest court in Illinois. (We take 1 if the winning party's

name is alphabetically prior to the loser's; 0 otherwise. Forget complications or ties). Call the sequence Arthur. We would not say that Arthur explains the judicial decisions in these cases, although Arthur is, in fact, a perfect correlation. Arthur has indefinitely many projections into the future. Suppose each academic lawyer in the United States were to project Arthur to a further 100 places at random. We would then have a very large variety of further sequences (Arthur Posner, Arthur Michelman, Arturo Calabresi, etc.) one of which would predict the results of the next, say, 100 decisions on the Illinois court better than any other, and, quite likely, very well indeed. But we would not say that, for example, Arthur Michelman had great predictive power or was a better theory of judicial decision making in Illinois on that account.

The point is both evident and important. Our standards for the explanation of human behavior require, in order for some account even to be a candidate for an explanation, that it bring to bear either a biological or a motivational account. If a correlation, however secure, cannot promise even the prospect of such a connection—if these connections cannot sensibly be taken even as mysteries waiting to be solved—then it becomes coincidence only. The claims for astrological and other occult explanations of behavior are problematical in this way. It strikes many people that both a motivational and a biological account are excluded by positive conclusions of physics that are beyond reexamination; but it strikes others that Hamlet's warning to Horatio is sound and pertinent.

We have three choices. We may disregard the putative correlation, between actual and wealth-maximizing decisions, as coincidental, and attempt to construct theories of adjudication that ignore it. That seems wasteful and perverse, for the correlation, if it exists, is different from the correlation between Arthur and the cases from which Arthur was constructed in one important respect. In the case of Arthur the method of construction guarantees that the correlation is coincidental rather than explanatory. In the case of economic analysis, coincidence is one hypothesis only.

Second, we may pursue the enterprise I suggested earlier in this section. We may try to construct a weak instrumental theory of wealth maximization showing why, in just the areas of law where the correlation holds, the weak instrumental theory, harnessed to some conventional idea of social value like utility, would recommend the wealth-maximizing strategy as a good means, and why it is plausible that judges realized this, in at least a rough and inarticulate way. That enterprise would carry economic analysis into layers of detail, of both political theory and intellectual history, it has not yet even begun to reach. But the enterprise cannot be dismissed in advance.

There is a third choice. We may try to embed the correlation in a radically different sort of analysis and explanation. We may try to show that the decisions that seem to maximize wealth are required, not as instrumental decisions seeking to produce a certain state of affairs, of social wealth, utility, or any other goal of policy, but rather as decisions of principle enforcing a plausible conception of fairness. We might aim, that is, at an explanation of principle, instead of an explanation of policy. I have, on various occasions, tried to show why an account of judicial decisions on grounds of principle should always be preferred to one on grounds of policy, for normative and positive reasons. I have also illustrated a strategy for a principled account of judicial decisions that look to consequences, including third-party consequences.[14] This strategy of principle seems to me much more promising than the weak instrumental program of policy just described. But I have not yet provided any compelling reasons why you should join me in that confidence.

After my essay for this Symposium was in galley, Professor Posner decided to add an unscheduled reply.[15] He has invited me briefly to comment on his remarks, and though I shall not notice every point on which we disagree, I think that the following are the most important.

1. At the outset of my argument I said that I would use the phrase "component of social value" as a term of art. I would use it, I said, to

[14] See Ronald Dworkin, Taking Rights Seriously 98-100, 294-327 (pap. ed. 1977). See also my forthcoming article, Why Efficiency?, in a forthcoming issue of the Hofstra Law Review, particularly Section 3 of Part II thereof. In the article I have criticized here, Posner makes several comments about my own work. His remarks are not pellucidly consistent. He cites me as his first example of a legal philosopher who argues that legal theory should not be based on utilitarianism. So far so good. But then he speculates about whether I am a "genuine Kantian" or only something he calls a "utilitarian of the egalitarian school." And he later remands that I am "arguably" what he calls a "left-wing utilitarian." May I help? I am not a "Kantian" as defined (see note 10 *supra*) though I am very drawn to what I regard as the essential liberalism and egalitarianism of Kant's own theory. I am an egalitarian, though I have tried to describe a conception of equality, which requires that individuals be treated as equals rather than given equal treatment under some particular description, and some of my critics argue that this is not the correct conception of equality. I do not know whether I am left-wing, because I do not understand the sense well enough to be capable with the extension. I am mystified, however, as to why I should be considered a utilitarian, closet or crypto or otherwise. I have argued that so far as utilitarian calculations have any place in political argument (and I think that something *like* utilitarian calculations over preferences do have *some* place) then they must at least be cleansed of what I call "external" preferences. But a utilitarian is not someone who argues that such calculations have some place. He argues that they must occupy all the space there is. Those who find any interest in this autobiographical matter (if there are any) may wish to consult my Taking Rights Seriously, *supra* at 357 & *passim*.

[15] Richard A. Posner, The Value of Wealth: A Comment on Dworkin and Kronman, 9 J. Legal Stud. 243 (1980).

describe aspects of society valuable in themselves. There was no play on words, only some attempt at care with words. Posner is now explicit that he does not believe that wealth is a component of value. I said that I doubted anyone did, but in footnote 4 I gave some instances of statements of his that (perhaps carelessly) suggested the contrary.

The story of Derek and Amartya is only meant to show that wealth cannot be taken to be a component of value. (I offered distinct and much longer arguments against the more plausible claim that wealth is instrumental towards value.) So Posner's remark, that the Derek-Amartya example obscures the instrumental character of wealth maximization, is beside the point, and his observation that the story does not provide "plausible reason" for taking the transaction from the market is simply the misunderstanding I warned against in note 5.

2. The problem I proposed to "dispose of" early in my paper is not the problem of "wealth effects" that Posner discusses in his second point, except in a trivial sense. It is the analytically distinct grass-is-greener problem that touches, as I said, the completeness rather than the circularity of wealth maximization. (And of course I meant to "dispose of" that problem, not in the sense of solving it, but simply defusing it as a criticism of Posner.)

The problem of circularity I described later in the paper is *not* the problem illustrated by Agatha and Sir George. It is rather the problem I put on page 207, and which Posner ignores, that we cannot assign fundamental rights by asking who would buy what unless we have already assumed that some rights—to money or labor—are already assigned. The Agatha-Sir George example, on the other hand, was meant to test a much less global claim: that wealth maximization can provide a test for determining some rights—for example, the rights of some people to their own labor—once other rights *are* assumed to be in place, like the rights of Sir George and the bank to whatever funds they are supposed to have. So Posner's proof that I made some "mistake" in that example would not be a defense against the charge of circularity in the larger claim.

But in fact he does not show that I have made any mistake, even in that example. The question is (as I noted and he says) whether Agatha would in fact purchase her freedom if she began as Sir George's slave. I did not argue that she would not, but only that, since the matter depends on facts that would vary from case to case, "we cannot be confident that she would." If Sir George is enlightened, and understands the importance to Agatha's productivity of rest, recreation, and a good deal of worker job control, she would have to work at least roughly as hard to make the money for herself she would make for Sir George, and perhaps, if she is not so good as manager of her own time as he would be, much harder. The bank, on the other hand, would have to be confident that she *would* make more—how

much more would depend, as I said, on features not specified like interest rates and Sir George's other investment opportunities. "Nor," as I said, "is it by any means plain that, if she could borrow enough, she would. She gains very little actual control over the conduct of her life, as we have seen, and she loses a considerable degree of security."[16]

Posner meets all these economic and psychological contingencies with the flat statement that Agatha almost certainly could earn more money if free, and certainly would both be able to and want to buy her freedom if that were so. The world may be like that in Chicago economics, but not in fact.

3. Posner's comments under his third point fail to attend to the distinctions I made, and so conflate different arguments. My point about welfare-producing activity, for example, was critical, not of any supposed argument that wealth maximization maximizes transfers, but of his argument that wealth maximization is of value because it encourages behavior that produces benefits for others. His remarks about inherent moral value, in the same context, are deceptive. I distinguished the inherent moral value of an act "considered in itself" from the beneficial consequences it might or might not have, and made what I took to be the obvious point that a selfish act has no inherent moral value. But that is a matter of substantive morality, certainly not definition.

Posner's suggestion, that I criticize him for not stating precisely the mix of distribution, utility, and rights that constitute his ideal "pluralistic" goal, is also misleading. In fact I took great care, in my discussion of the pluralistic suggestion, to say that this was *not* my complaint. I summarized by argument in the following way. "My point is not that it is impossible antecedently to *describe* the 'best' mix of components, other than in the I-know-it-when-I-see-it fashion—although that is a bad sign. But rather that, at the level of fine tuning necessary to distinguish the results of wealth maximization from the results of compromises, there simply *is* no one 'best' mix antecedently more likely to be produced by one rather than the other of these social techniques."[17] Posner does not reply to the argument thus summarized.

4. Posner's fourth set of points speaks to my criticism of a claim that he himself has rejected: that wealth is instrumental towards value on a thoroughly utilitarian conception of value. He offers the standard rule-utilitarian response to my point, but it is misplaced here. Of course, rules that ask judges not to look to very specific issues of utility in particular cases—not to consider, for example, how much emotional pain this particular defendant will suffer if the decision goes against him—might maximize

[16] Page 210 *supra*.
[17] Page 215 *supra*.

utility in the long run. The question is whether a practice that tells judges *never* to look to utility, but only to wealth maximization, will produce more utility than rules that tell judges to take utility expressly into account in *some* cases, like the cases I describe, when the overall utility effects are likely to be very great. It is simply a non sequitur that if someone advocates rules of the latter sort he is committed to act-utilitarianism in every case.

5. Posner's fifth set of comments replies to the methodological discussion at the end of my paper. He suggests that I believe that the "empirical regularity" (if it exists) should be "disregarded." In fact I said that it would be "wasteful" and "perverse" to disregard it. I did say that a positive correlation of this sort is in itself no explanation if it "cannot promise even the prospect of either a biological or motivational connection." That is so (and it is also true of the complex "law" Posner imagines in these comments). I do not believe, for reasons given in the bulk of the paper, that Posner has shown such a promise, and he has himself rejected, as least as a general account, the evolutionary models he now mentions. The history is indeed an embarrassment, but of failure not riches.